

## U.S. Supreme Court's Denial of Actress's Petition Highlights First Amendment Protection of Docudramas

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The U.S. Supreme Court denied certiorari this month to Olivia de Havilland, the 102-year-old retired actress famous for her roles in such films as “Gone With the Wind” and “The Adventures of Robin Hood.”<sup>1</sup> De Havilland appealed a decision<sup>2</sup> from a California appellate court that dismissed her suit against the creators and producers of the television miniseries “Feud: Bette and Joan” under California’s anti-SLAPP law, a law designed to reduce frivolous lawsuits based on activity protected by the First Amendment.<sup>3</sup> The denial of certiorari leaves in place an opinion that delivered a major win for docudrama creators who take artistic license depicting public figures and highlights the availability of quick dismissal of certain suits under California’s anti-SLAPP law.

The first season of “Feud”—a docudrama covering famous celebrity quarrels—tells the story of the infamous rivalry between the now-deceased actresses Joan Crawford and Bette Davis, played by Jessica Lange and Susan Sarandon respectively.<sup>4</sup> Actress Catherine Zeta-Jones portrays de Havilland in “Feud”—a real-life friend and confidante of Bette Davis—in a limited role that totals less than 17 minutes of screen time over the eight-episode season.<sup>5</sup>

After the season aired, de Havilland sued “Feud”’s creators and producers, FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. (collectively FX), claiming they violated Civil Code section 3344, California’s statutory right of publicity, based on their use of de Havilland’s name and likeness without her consent.<sup>6</sup> De Havilland also asserted a false light claim based on the show’s portrayal of her saying and doing things that she claims are offensive and never happened.<sup>7</sup> De Havilland claims she was “falsely portrayed as a gossip who . . . shares intimate details on-camera about her close friend, Bette Davis, calls her sister a ‘bitch’ to others in her profession, and makes snide remarks about Frank Sinatra’s alcohol consumption.”<sup>8</sup>

FX filed a motion to strike the suit under California’s anti-SLAPP law, arguing that de Havilland’s claims were made in an effort to curtail FX’s exercise of its right of free speech under the First Amendment.<sup>9</sup> FX filed several declarations in support of its motion, including one from Ryan Murphy, a co-creator, executive producer, writer, and director of “Feud,” who stated that Zeta-Jones’s portrayal of de Havilland was intended to be that of “a wise, respectful friend and counselor to Bette Davis, and a Hollywood icon with a unique perspective on the past.”<sup>10</sup>

<sup>1</sup> *De Havilland v. FX Networks, LLC*, No. 18-453, 2019 WL 113121, at \*1 (U.S. Jan. 7, 2019).

<sup>2</sup> See *De Havilland v. FX Networks, LLC*, 230 Cal. Rptr. 3d 625 (2018), *cert denied*, No. 18-453, 2019 WL 113121 (U.S. Jan. 7, 2019).

<sup>3</sup> See generally CAL. CIV. PROC. CODE § 425.16. “SLAPP” is an acronym that stands for strategic lawsuit against public participation.

<sup>4</sup> See IMDB, “[Feud](#)” (last visited Jan. 22, 2019).

<sup>5</sup> *De Havilland*, 230 Cal. Rptr. 3d at 631.

<sup>6</sup> See CAL. CIV. PROC. CODE § 3344(a) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without such person’s prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

<sup>7</sup> See *de Havilland*, 230 Cal. Rptr. 3d at 642 (“False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.”) (citation omitted). De Havilland also asserted claims of misappropriation and unjust enrichment. The court of appeal analyzed the misappropriation and the right-of-publicity claim together, see *id.* at 635–36, and it denied the unjust enrichment claim because her other claims failed. *Id.* at 646–47.

<sup>8</sup> PETITION FOR WRIT OF CERTIORARI (PETITION), No. 18-453, at 5.

<sup>9</sup> See CAL. CIV. PROC. CODE § 425.16(a).

<sup>10</sup> *De Havilland*, 230 Cal. Rptr. 3d at 646.

The trial court denied FX's motion, and FX sought immediate review.<sup>11</sup> The California court of appeal reversed and dismissed de Havilland's suit.<sup>12</sup> The court noted that generally, a plaintiff's claims need only have "minimal merit"<sup>13</sup> to survive an anti-SLAPP motion, but because de Havilland is a public figure, she was required to demonstrate by clear and convincing evidence that FX acted with actual malice in order to defeat the motion to strike her false light claim.<sup>14</sup> In order to show actual malice on behalf of a docudrama's creators, de Havilland was required to show that FX "intended to convey [a] defamatory impression," that is "that FX either deliberately cast her statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that it knew or acted in reckless disregard of whether its words would be interpreted by the average reader as defamatory statements of fact."<sup>15</sup> The court pointed to Murphy's declaration in holding that de Havilland had not met this high burden.<sup>16</sup> In addition, the court did not consider the remarks attributed to de Havilland to be highly offensive.<sup>17</sup>

As to her statutory right-of-publicity claim, the court held that the First Amendment protected *Feud*, even though the creators did not obtain de Havilland's permission or provide compensation for using her name and likeness.<sup>18</sup> The court stated: "*Feud* is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays."<sup>19</sup> In any event, the court reasoned, "*Feud*" did not violate section 3344 because it was "transformative" and derived its value not from de Havilland's fame, but from the "creativity, skill, and reputation of *Feud*'s creators and actors."<sup>20</sup> The Supreme Court of California declined to review the case.

In her petition for certiorari, de Havilland claimed that the lower court adopted a new and sweeping rule that "the First Amendment grants absolute protection for knowing or recklessly published false statements in docudrama format."<sup>21</sup> She also asserted that the court of appeal's opinion questioned section 3344's validity under the First Amendment.<sup>22</sup> In its response, FX disputed that the court of appeals had created a new standard; it argued the court faithfully applied the traditional actual malice test consistent with First Amendment jurisprudence regarding public figures.<sup>23</sup> FX also contended that this case was a poor vehicle to examine the application of the First Amendment to right-of-publicity claims under section 3344 because the court of appeal did not decide this issue and was skeptical as to whether that statute even applied.<sup>24</sup>

The U.S. Supreme Court denied de Havilland's petition for certiorari without stating its reasoning.<sup>25</sup> This denial should comfort Hollywood creatives who look to portray a public figure in their next work: the California court's opinion indicates that if a docudrama creator can show that he or she had no defamatory intent—even if the depiction of the public figure includes inaccuracies—that creator will likely achieve early dismissal of a resulting

<sup>11</sup> See CAL. CIV. PROC. CODE § 425.16(i) (providing for the interlocutory appeal of an order granting or denying a motion to strike).

<sup>12</sup> *De Havilland*, 230 Cal. Rptr. 3d at 647.

<sup>13</sup> *Id.* at 634–35 (citing *Navellier v. Sletten*, 124 Cal. Rptr. 2d 530 (2003)).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 646 (citing *Dodds v. Am. Broadcasting Co.*, 145 F.3d 1053, 1063–64 (9th Cir. 1998); *Good Gov't Grp. of Seal Beach, Inc. v. Superior Court*, 150 Cal. Rptr. 258, 263–64 (Cal. 1978)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 643–46.

<sup>18</sup> *Id.* at 637–39.

<sup>19</sup> *Id.* at 638 (internal quotations marks omitted).

<sup>20</sup> *Id.* at 641–42 (applying the "transformative" test articulated in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 106 Cal. Rptr. 2d 126 (Cal. 2001)) (internal quotation marks omitted).

<sup>21</sup> PETITION at 1.

<sup>22</sup> *Id.*

<sup>23</sup> BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI (RESPONSE), No. 18-453, at 16–18.

<sup>24</sup> *Id.* at 22–24.

<sup>25</sup> See *De Havilland*, 2019 WL 113121, at \*1.

false light claim under California's anti-SLAPP law. In addition, the remaining opinion highlights the First Amendment's protection of an artistic depiction of a real person, even when the creator does not obtain that person's permission or offer compensation.